No. 2021

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE FIDELITY LUMBER COMPANY,
Plaintiff in Error,

v.

GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Writ of Error from United States Circuit Court, Western District, of Washington, holding Terms at Seattle.

H. M. STEPHENS,
Attorney for Plaintiff in Error.
Spokane, Wash.

COLE PRINTING COMPANY

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STATEMENT OF CASE.

(The figures in parentheses in this brief refer to folios of the Record.)

The facts in this case are shown by the admissions in the pleadings and the Statement of Facts in the case. Paragraphs I, II, III, and IV of the Complaint are admitted by the Answer. They are as follows:

I.

That the Great Northern Railway Company is and at all times hereinafter mentioned was a corporation

duly organized and existing under and by virtue of the laws of the State of Minnesota.

II.

That the defendant, the Fidelity Lumber Company, is now and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

III.

That the Great Northern Railway Company is now and at all the times hereinafter mentioned was a common carrier of freight and passengers from points within to points without the State of Washington, and from points within to points without the State of Idaho, and as such carrier is and at all times was subject to and amenable to the provisions of that certain act of Congress, entitled "An Act to Regulate Commerce," approved February 4th, 1887, and the acts of Congress amendatory thereof and supplemental thereto.

IV.

That heretofore and prior to October 31st, 1907, plaintiff, together with other carriers amenable to said Act to Regulate Commerce, and in pursuance of the provisions of said Act, filed and published certain tariffs prescribing rates for the transportation of lumber, shingles and other forest products from points within to points without the States of Washingon and Idaho, which were substantially higher than the rates theretofore in force between said points, and in force up to and including October 31st, 1907. That heretofore, to-wit, on or about

October 31, 1907, the Honorable C. H. Hanford, one of the judges of the above Court, signed and entered an order by the terms whereof this plaintiff was enjoined from collecting or receiving from the Pacific Coast Coast Lumber Manufacturers' Association, or from the Shingle Mills Bureau, or from any persons, firms or corporations who were members of the said Pacific Coast Lumber Manufacturers' Association or of the Shingle Mills Bureau, or from the consignees of said Association or Bureau or the members thereof, amounts for the shipment of lumber, shingles or other forest products described in its certain tariffs to which this plaintiff was a party, and filed with the Interstate Commerce Commission, and known as I. C. C. Tariff Number 850, and Great Northern I. C. C. No. A2667, and Northern Pacific I. C. C. Tariff No. A3432, in excess of the rates shown in the schedules of said tariffs on file with the Interstate Commerce Commission and in force up to and including October 31, 1907. That said order so signed and entered by the said Honorable C. H. Hanford, was signed and entered upon a certain bill of complaint filed in said Court wherein the said Pacific Coast Lumber Manufacturers' Association, and others, were complainants, and the Great Northern Railway Company, and others, were defendants, which said bill and the cause in which the same was filed, was known and designated in said Court as Case No. 1565.

Paragraph V of the Answer is as follows:

V.

Admits that the Potlatch Lumber Company, the Fidelity Lumber Company, and others, filed their complaint in intervention in said action No. 1565, mentioned

in paragraph numbered "IV" of the Complaint of plaintiff herein, by leave of Court, and therein and thereby prayed that they have the benefit of the original order in said action and of the intervention order therein, and that the defendants in said action be enjoined and restrained from collecting freight rates on lumber and forest products in excess of the rates in existence October 31, 1907, from point of shipment to destination, and admits that a restraining order or injunction was issued on the 18th day of November, 1907, enjoining and restraining the defendants in said action as aforesaid, and permitting thereby the intervenors to have the benefit of the order of Court theretofore and then entered, upon compliance with the order of Court with reference to giving of bond; and admits that the order was as set forth in paragraph numbered "V" of the Complaint of plaintiff herein; and defendant denies each and every other allegation, matter and thing contained in paragraph numbered "V" of the Complaint of plaintiff herein.

Paragraph VI of the Complaint is as follows:

VI.

That thereafter the defendant Fidelity Lumber Company agreed to and with the Great Northern Railway Company that in accordance with the terms of said order of November 18, 1907, it would pay to the Great Northern Railway Company, for and on account of the shipment and transportation of lumber, shingles and forest products under said order, from points within to points without the States of Washington and Idaho, the difference, if any, between the amount paid for such service at the rate provided by said order of November 18, 1907, and

whatever rate should be finally established as the rate lawfully chargeable therefor on and after November 1, 1907.

Paragraph VI of the Answer is as follows:

VI.

The defendant admits the allegations of paragraph numbered "VI" of the Complaint, but in this connection the defendant alleges that the Interstate Commerce Commission cannot legally establish a rate which is not subject to review by the Courts, and that the meaning of the order and the obligation upon defendant in making shipments was to pay such lawful rate as may be finally determined and established by the Courts.

Paragraphs VII and VIII of the Answer are as follows:

VII.

Defendant admits that in pursuance of said order of November 18, 1907, and the original order entered in said action, the plaintiff received from defendant and caused to be transported from points in Washington and Idaho to points in other states, lumber and forest products as set forth in paragraph "VII" of the Complaint. And defendant denies each and every other allegation, matter and thing contained in paragraph numbered "VII" of the Complaint of plaintiff herein.

VIII.

Defendant admits that on or about June 2, 1908, the Interstate Commerce Commission, upon the complaint of the Potlatch Lumber Company, defendant, and others,

in pursuance of law, fixed and determined the rates legally chargeable for the transportation of lumber, shingles and other forest products between Washington and Idaho points and points in other states from which and to which said products were transported by plaintiff for the defendant; and defendant denies each and every other allegation, matter and thing contained in paragraph numbered "VIII" of the Complaint of plaintiff herein.

Defendant alleges that under and by reason of the law the plaintiff is not entitled to the sum or amount set forth and mentioned in paragraph "VIII" of the Complaint of plaintiff herein.

That plaintiff herein and intervenors in said original action do not agree as to what amount the shippers and intervenors should pay the plaintiff herein upon shipments made by said shippers and intervenors. That the shippers and intervenors contend that no greater rate can be charged than that fixed by the Commission from point of shipment to point of destination, and plaintiff herein contends that it is entitled to collect from said shippers and intervenors the Pacific Coast rate for shipments made from points in Eastern Washington and Northern Idaho to points east of the Pembina line, between November 1, 1907, and the date when the Interstate Commerce Commission fixed and determined the rates to be charged by the plaintiff and other carriers. That the claim made by the plaintiff is based purely and simply upon the Pacific Coast rate and not the rates in effect October 31, 1907, nor which were designated in the tariff which it is claimed became effective November 1, 1907, nor the amount fixed by the Inter-

state Commerce Commission as the rates from Eastern Washington and Northern Idaho to points of destination.

The other allegations in the complaint are denied.

The facts in addition to the admissions of the answer are shown in the record at pp. 13 to 56, 62-3.

Defendant is a common carrier of interstate traffic, and for a long time had a tariff upon forest products covering interstate shipments, which tariff remained in effect to and including October 31, 1907. Defendant in error filed a tariff with the Interstate Commerce Commission effective November 1, 1907. Before the new tariff went into effect an injunctive action was commenced in the Circuit Court of the United States at Seattle, Washington, wherein and whereby the carriers were enjoined and restrained from collecting more than the rate in effect October 31 ,1907. That action was appealed to this Court and the lower Court affirmed. Shippers who were not original parties to that injunction suit were permitted to intervene. Plaintiff in error intervened and secured the benefit of an injunction granted therein, and made shipments in accordance with the order of the Court and paid the rate in effect in October, 1907. An action was commenced before the Interstate Commerce Commission affecting rates upon forest products from the Spokane District (in which district plaintiff in error does business). The Commission, for the most part, condemned the raise in rates, but did make some increase east of what is known as the Pembina line, the increase from the Spokane District being two cents per hundred pounds.

In the original decision in the Spokane case (which is herein synonymous with Potlatch Lbr. Co. case), to which the defendant in error was a party, the Commis-

sion stated that no reparation was asked. There was a prayer for general relief, and immediately upon receipt of the decision counsel for the complainants wrote the Commission that reparation was desired (pp. 15, 27-32), and later an order was made that reparation should be made as to all shippers and by all carriers and accounts rendered and filed in the Pacific Coast cases (25-7). Later the carriers contended that that order only permitted reparation to be made upon the basis of Pacific Coast rates, and the Commission so ordered (33-5) without any finding of fact other than originally made in the original decision in which certain rates were held to be reasonable and certain lower rates held to be reasonable for the Spokane District, the Commission also holding that the Spokane District was entitled to lessor rates because of shorter distance and shorter haul and the basis of reparation by the Commission was arbitrarily made without reference to the old rate, that is, the rate in effect on October 31, 1907, or the rates fixed by the Commission from the Spokane District. The basis of reparation for the Spokane District shippers is not any rate that was ever in force or effect from the Spokane District or fixed by the carriers or by the Commission. The complainants filed petition for rehearing and made application to file supplemental petition and to amend their original petition asking for reparation (15, 16-25, 36-46, 49-54). All these were denied, but reparation was ordered and the basis thereof arbitrarily fixed on the Coast rates (27, 35).

The shipments involved in this action were made by the plaintiff in error from its place of business in Washington and Idaho to points east of what is designated in the Commission decision as the Pembina line. The rate

from points of shipment to point of destination in effect October 31, 1907, was 40 cents per hundred pounds. The rates fixed by the advance or new tariff of defendant in error effective November 1, 1907 (except for the injunction), was 45 cents per hundred pounds and the rate fixed by the Interstate Commerce Commission was and is 42 cents per hundred pounds. This action is for the difference between the rate in effect October 31, 1907, and the Pacific Coast rate fixed by the Interstate Commerce Commission, *viz.,* 45 cents per hundred pounds, that is, a difference of 5 cents per hundred pounds. The plaintiff in error insisted below and insists now that the judgment should be for only two-fifths of the amount sued for instead of the whole of the sum sued for. The amount sued for is $2805.65, for which judgment was rendered.

The rates in effect October 31, 1907, was 40 cents from Spokane, and beginning about eighteen miles east of Spokane the rates were less than they were from Spokane, the difference was two and three cents. At Sandpoint, about one hundred miles east of Spokane, the rate was still less and a greater differential existed between the Sandpoint and the Spokane rate. In one of the Pacific Coast cases (14 I. C. C. 19) the Commission held that the rates in effect prior to November 1, 1907, to all points on and west of the "Pembina" line "were and are just and reasonable and should be restored," and further held in that case that rates from the Pacific Coast to points east of the "Pembina" line "might reasonably be somewhat increased. Such increase should not, however, in any case exceed the rates in effect immediately prior to November 1, 1907, by more than 5 cents per 100 pounds." (p. 19.)

As to reparation, the Commission said (14 I. C. C., p. 20):

"While permitting some rates to be increased this adjustment also reduces some rates below what they were immediately prior to the increase complained of. We think that complainants are entitled to reparation only upon shipments upon which charges were collected in excess of the rates between the same points which were in effect immediately prior to November 1, 1907; that in instances in which the rates herein prescribed are not lower than the rates which were in effect between the same points immediately prior to November 1, 1907, such reparation should be measured by the difference between the rates actually paid and those herein prescribed; and that in instances in which the rates herein prescribed are lowr than the rates which were in effect between the same points immediately prior to November 1, 1907, such reparation should be measured by the difference between the rates actually paid and those which were in effect between the same points immediately prior to November 1, 1907."

In another of the Pacific Coast cases the Commission held (14 I. C. C. 39):

"It seems clear from all the facts appearing that the rates in effect prior to the advances made in November, 1907, to points of destination, generally, west of the Missouri River were fairly remunerative. To certain points farther east, involving longer hauls, it is believed that there was justification for some advance in view of the less revenue per ton per mile accruing to the carriers from this traffic."

The Commission further held that the rates involved in and upon the hearing applying from points on and

west of the "Pembina" line "are unreasonable and unjust to the extent that they exceed those that were in effect over the lines of the defendant carriers, respectively, on October 31, 1907, between the respective points of origin and destination shown in the rate schedules hereinbefore specified. It is also the opinion of the Commission that the rates now in effect from said points of origin to points in territory" east of the "Pembina" line "are unreasonable and unjust to the extent that they exceed 5 cents per 100 pounds above the rate in effect October 31, 1907." (14 I. C. C. 40.)

As to reparation, the same rule was made as in the other case quoted from, *viz.*:

"While permitting some rates to be increased this adjustment also reduces some rates below what they were immediately prior to the increase complained of. We think that complainants are entitled to reparation only on account of shipments upon which charges were collected in excess of the rates between the same points which were in effect on October 31, 1907; that in instances in which the rates herein prescribed are not lower than the rates which were in effect between the same points on October 31, 1907, such reparation should be measured by the difference between the rates actually paid and those herein prescribed; and that in instances in which the rates herein prescribed are lower than the rates which were in effect between the same points on October 31, 1907, such reparation should be measured by the difference between the rates actually paid and those which were in effect between the same points on October 31, 1907. (14 I. C. C. 40.)

In the Spokane case, the Commission goes extensively into the various districts and shows some of the differ-

ence in rates between Spokane and points east of Spokane and the Coast, prior to November 1, 1907. (14 I. C. C. 42-5.)

In the Potlatch (Spokane) case, the Commission used the following language:

"From the above it will be seen that the defendant carriers have by their own voluntary actions admitted the propriety, not only of a group or blanket, for the purpose of rate making from the Spokane-Sandpoint District, but also that some differential under the Coast should be allowed to that group. * * * Their claims in this regard are based upon (a) the distance, (b) the mountain grades to the summit of the Cascades, and (c) the wide treeless farming section, all to be traversed from the Coast before the timber of the Spokane District is reached. * * *

"Two facts stand out as beacon lights in the sea of testimony produced in this case: * * *; the other is that the carriers by the tariffs complained of, as well as in part by the old tariffs, have admitted in part the propriety of a differential in favor of the Spokane District, as grouped in the new tariffs and in part in the old, as against the Coast.

"A careful examination of the testimony as a whole makes it plain that a differential in favor of Spokane and the Spokane District under the rates from the Coast should exist, but there is great difficulty in determining just what the amount of that differential should be, and from what shipping and to what destination points it should apply. The same is true of the district bordering the eastern slope of the Cascade Range. If, however, the tables hereinbefore set out are referred to, it will be apparent that even under the old tariffs differentials

under the Coast were allowed from some shipping points in the present Spokane-Sandpoint District to certain destination points, the grading being from nothing in Minnesota to 6 cents on the line of the Northern Pacific between Mandan and Sully Springs, inclusive, in North Dakota; and along the line of the Great Northern from nothing in Minnesota to from 1 cent at Petersburg to 7 cents at Buford, N. Dak. To the old Spokane District proper no differential under the Coast was allowed. Under the new tariffs, along the lines of the Great Northern and Northern Pacific the differentials from the present Spokane-Sandpoint District under Coast rates are 5 cents in Minnesota, and from 5 cents to 8½ cents in North Dakota. By these same new tariffs the rates from the Montana-Oregon group to various common destination points are from nothing to 5 cents under the Spokane rates, the basing of the Montana-Oregon group being, however, directly under the Coast rates and not under the Spokane rates. The rates from the eastern slope of the Cascade Range are 2½ cents higher than the Spokane rates in all cases, this differential being apparently an intermediate or half step between the Coast and the Spokane rates. These facts, though not conclusive of the grouping that should be made under a practical restoration of the tariffs in effect prior to November 1, 1907, are strongly persuasive that some changes in the former groupings should be made.

* * * "For the purposes of this case it is sufficient that the defendant carriers by their own acts in establishing the various tariffs, old and new, have made admissions, in the nature of estoppels *in pais*, that parts of the Spokane District, as grouped since November 1, 1907, should have a differential under the rates from the Coast,

and that an intermediate differential should apply to the eastern slope of the Cascade Range—the two districts being separated by a natural barrier of farming country.

* * * "In view of the physical facts, emphasized in the record of this case, that Spokane is separated from the Pacific Coast by a rail distance little short of 400 miles by the routes actually used; that in most of these routes the haul from the Coast necessarily crosses the Cascade Range; that for something like 200 miles east of the Cascades the country is a treeless farming region until the immediate vicinity of Spokane is reached, the Commission's conclusions are that the rates on interstate shipments of lumber, shingles, and other forest products from the groups hereafter named to points on and west of a line drawn from Pembina, N. Dak., southward through Grand Forks, N. Dak., Moorhead and Breckenridge, Minn., Sioux City and Council Bluffs, Iowa, St. Joseph and Kansas City, Mo., and thence to Port Arthur, Texas, along the Kansas City Southern Railway, including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the rates on similar shipments from the "Coast Rates" group as follows:

"Rates from the group points east of the summit of the Cascade Mountains, and west of the present "Spokane Rates" group, to points on and west of said line from Pembina, N. Dak., to Port Arthur, Tex., including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the rates prescribed by the Commission in Cases Nos. 1327, 1329, and 1335 from the "Coast Rates" group by differentials

beginning at not less than 2 cents per 100 pounds and graded up westwardly therefrom (a) to a differential of not less than 6 cents per 100 pounds at Buford, N. Dak., on the line of the Great Northern Railway; (b) to a differential of not less than 6 cents per 100 pounds at Medora, N. Dak., on the line of the Northern Pacific Railway; (c) to a differential of not less than 6 cents per 100 pounds at Edgemont, S. Dak., on the line of the Chicago, Burlington & Quincy Railroad; (d) to a differential of not less than 6 cents per 100 pounds at Cheyenne, Wyo., on the line of the Union Pacific Railroad; (e) and to a differential of not less than 6 cents per 100 pounds at Denver, Colo., on the line of the Union Pacific Railroad.

"Rates from the present "Spokane Rates" group and from the present "Montana-Oregon Rates" group to points on and west of said line including all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the "Coast Rates" as prescribed in the cases specified, by differentials beginning at not less than 3 cents per 100 pounds and graded up westwardly therefrom to a differential of not less than 7 cents per 100 pounds at Buford, N. Dak., Medora, N. Dak., Edgemont, S. Dak., Cheyenne, Wyo., and Denver, Colo., as described in the preceding paragraph.

"Rates from the group of points east of the summit of the Cascade Mountains, and west of the present "Spokane Rates" groups, to points east of said line, Pembina-Port Arthur, and excluding all points that now take the same rates as any of the points located on said line between and including Sioux City, Iowa, and Kansas City, Mo., should be less than the "Coast Rates," as pre-

scribed in the cases specified, by a differential of not less than 2 cents per 100 pounds, up to and including Duluth, Minneapolis, St. Paul and Minnesota Transfer, and from the Missouri River crossings to the Mississippi River crossings.'' (14 I. C. C. 46-9.)

ASSIGNMENT OF ERRORS.

The Assignment of Errors of plaintiff in error made and filed with defendant's application for writ of error herein, omitting formal parts, is as follows:

I.

That the United States Circuit Court, in and for the Western District of Washington, holding terms at Seattle, erred in rendering judgment for the plaintiff Great Northern Railway Company.

II.

The said Court erred in rendering judgment for any amount in excess of two-fifths of the amount sued for.

III.

The said Court erred in its Conclusions of Law, to the effect, and holding, that plaintiff is entitled to judgment herein.

IV.

The said Court erred in not holding and determining that plainiff was entitled to recover not to exceed two-fifths of the amount sued for.

V.

The said Court erred in holding that plaintiff was entitled to judgment for anything in excess of the rates fixed by the Interstate Commerce Commission, to-wit, 42 cents per 100 pounds, from point of shipment in this action to points of destination.

VI.

The Court erred in not determining that it would be depriving the defendant of its property without due process of law, to require it to pay an unjust and unreasonable rate, or any rate in excess of that fixed by the Interstate Commerce Commission as to future rates.

VII.

The said Court erred in holding that for reparation purposes the Interstate Commerce Commission fixed the Pacific Coast rate to points of destination of shipments involved in this action, which Pacific Coast rate is fixed for a distance of more than four hundred miles more haul, as compared with the haul from the point of shipment to points of destination involved in this action.

VIII.

The said Court erred in not holding that it was beyond the power of the Interstate Commerce Commission not to allow reparation on the basis fixed as reasonable rates by the Interstate Commerce Commission.

IX.

Said Court erred in not holding that reparation must

be upon the basis of a reasonable rate, and erred in not holding that the reasonable rate for reparation must either have been the rate in effect October 31, 1907 (prior to the effective date of the proposed advanced rates which were condemned by the Commission), or the rate fixed by the Interstate Commerce Commission.

X.

The said Court erred in reaching the conclusion of law and rendering judgment for the plaintiff herein, because the judgment and the result thereof is the taking of the property of the defendant without due process of law, and the effect of the judgment rendered by the Court is that defendant is required thereby (if the same be not reversed) to pay an illegal, unreasonable, unjust and unlawful freight rate upon the shipments involved in this action.

POINTS, AUTHORITIES AND ARGUMENT.

Plaintiff in error will discuss all the errors assigned together because they weave into each other in such manner that it will be easier and will require much less time and space to consider them together.

Plaintiff in error with other shipper pursued the course which is required under the case of Texas & Pacific Railway Company vs. Abilene Cotton Oil Company, 214 U. S. 426, 27 S. C. R. 350, in which it was held that before an action can be maintained in Court for reparation it is necessary to go before the Commission and have an order fixing rates. It is nowhere intimated in that case that if the Commission fails to order repara tion such as the law contemplates that a shipper is with-

out relief. To enforce that rule would deny the shipper the equal protection of the law and take his property without due process of law, and be in violation of the Commerce Act.

The shipper has the same right under the Constitution to present to the Court the question of taking property without due process of law, and the matter of equal protection of the law to the same extent and in the same way as carriers have those rights. Any other construction of the statute would render it unconstitutional and void.

It has recently been held by the Circuit Court of Appeals of the Eighth Circuit in Denver & R. G. R. Co. vs. Baer Bros. Mer. Co., 187 Fed. 485, that the Interstate Commerce Commission has no power to order reparation without fixing a reasonable rate for the future. It follows that the future rate is, for the purpose of reparation, a reasonable rate fixed by the Commission.

The Commission allowed Coast shippers reparation based on future Coast rates from points of shipments to points of destination, from Coast points to where shipments involved in this action were carried and transported by the defendant in error.

Express findings are made as to reasonable rates from Pacific Coast points for the past as well as the future, and express finding is made in the Potlatch Company case that shippers from the Spokane District are entitled to lesser rates than Pacific Coast shippers are entitled to, and no other or different finding of fact was ever made by the Commission, but the Commission arbitrarily, without any finding of fact refused to allow reparation in accordance with their finding as to what

are reasonable rates from the Spokane District. There isn't any evidence in the case or any finding of the Commission that warrants the assertion that the Commission found the Pacific Coast rates to be reasonable for the purpose of reparation or the period of time between October 31, 1907, and the date when the order became effective as to future rates. No testimony was taken after the original decisions were rendered, no rehearings or amendments or supplemental pleadings were allowed and the facts were found and based upon evidence introduced and admitted before any of the decisions were rendered. Hence, there isn't any evidence or facts found or determined by the Commission that warrant the arbitrary, unjust and unreasonable conclusion that the shippers of the Spokane District must for a specific period of time pay the Pacific Coast rate when that was neither the old rate nor the advanced railroad rate nor the rate fixed by the Commission.

If the conclusions of the Commission are not supported by proper findings, their order is a nullity.

> *Southern Pacific Company et al. vs. I. C. C.*, 219 U. S. 433, 31 S. C. R. 288.

It has been decided by the United States Commerce Court in Decision No. 5—July 20, 1911—Hooker *et al.* vs. I. C. C., that a shipper can invoke the constitutional provisions and the aid of a Court of equity in the same manner and to the same extent that the carriers may (p. 6).

The same Court reached the same conclusion in its Decision No. 9 (pp. 3-7).

The same conclusion was reached in the case of Peavy

& Co. vs. Union Pacific Co., 176 Fed. 409, by three Circuit Judges.

It has been settled law ever since the case of Smythe vs. Ames, 169 U. S. 466, 18 S. C. R. 418, that carriers have the constitutional right to have rate legislation and orders reviewed by the Courts.

The carriers are constantly appealing to the Courts for injunctive and other relief against orders of the Interstate Commerce Commission.

Southern Pac. T. Co. vs. I. C. C., 219 U. S. 433, 31 S. C. R. 288.

I. C. C. vs. N. P. Ry. Co., 216 U. S. 538, 30 S. C. R. 417.

I. C. C. vs. Delaware L. & W. R. Co., 220 U. S. 235, 31 S. C. R. 392.

We are not unmindful of the fact that under the amended Commerce Act, pure and simple findings of fact of the Commission are presumptively correct, and possibly the rule goes further and makes pure and simple findings of fact conclusive.

Ill. Central R. R. Co. vs. I. C. C., 215 U. S. 452, 30 S. C. R. 155.

I. C. C. vs. Delaware L. & W. R. Co., 220 U. S. 235, 31 S. C. R. 397.

I. C. C. vs. Chicago etc. Co, 218 U. S. 88, 30 S. C. R. 651, 659.

These cases, while extending the rule as to findings of fact beyond what the rule formerly was, recognize that the Courts have a right of review upon all law and constitutional questions.

The holdings of these cases are that the Courts can not review administrative matters or pure and simple findings of fact, but can review all questions arising under the constitution or laws of the United States or the Commerce Act itself. The holding in So. Pac. v. I. C. C., 219 U. S. 433, is that the Commission must find sufficient facts to warrant the conclusion or order made, or they will be set aside.

If the result of the order of the Commission is to create a discrimination which is prohibited by the Act the order is beyond the power of the Commission and cannot be enforced either by the Commission or the Court, and when an action such as the one at bar is founded upon the order of the Commission which is in conflict with the terms of the act, and there are no findings of fact upon which the order can be sustained, no liability can be enforced and no judgment rendered. The cases herinbefore cited seem conclusive upon these questions.

The judgment of the lower Court in this case results in a necessary violation of the Commerce Act because it creates an absolute and perfect discrimination and is in direct conflict with the findings of the Commission set forth in the "Statement of the Case" herein. The Commission expressly finds and determines that a lower rate should exist from the Spokane District than from the Coast District, and expressly determines that a lower rate than the Coast rate is a reasonable rate from the Spokane District. These findings of fact, if they be deemed *prima facia* correct or conclusively correct nec essarily prevent the Commission from making an order in direct conflict with such findings.

To enforce the judgment in this action, in addition to

the discrimination that would necessarily result, requires the further violation of the statute, in that it would require the plaintiff in error to pay an unreasonable rate and one which has not been found to be reasonable by the Commission and no facts are found upon which a conclusion can be drawn that it was a reasonable rate at the time the shipments were made.

To sustain the judgment herein would deprive the plaintiff in error of its property without due process of law just as much and to the same extent as an unreasonably low rate would deprive a carrier of its property without due process of law. It is just as much a violation of the due process of law provision of the Federal Constitution to require a shipper to pay an unreasonable, unjust and exorbitant rate as it is to require a carrier to carry shipments at an unreasonably low rate, and the right to raise and adjudicate these questions exists in the shipper the same as in the carrier, or the Federal Constitution as to the equal protection of the laws will be violated.

Section 1 of the Commerce Act provides that all charges for any service rendered "shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 2 provides against discrimination which is prohibited and declared to be unlawful, and Section 3 makes provision against unlawful preference or advantage to any person, which unreasonable preference or advantage are declared unlawful.

Under the findings of fact, by the Commission, to fix or charge the Coast or same rate from Spokane District to points between the "Pembina" line and Minneapolis

transfer points (Minneapolis-St. Paul) would necessarily be an unjust rate from the Spokane District and necessarily a discrimination and unreasonable preference and advantage and prohibited by the Commerce Act.

The judgment in this case should not have exceeded the rate fixed by the Commission from points of shipment to points of destination. That was the rule fixed for reparation from the Coast District, and to apply any other rule to the Spokane District would clearly be an unjust and unlawful preference and discrimination.

The reparation order from the Coast shipping points was the difference between the rate in effect October 31, 1907, and the rate actually paid, in all instances where the rates were not raised by the Commission. When the rates were raised, then the reparation order was the difference between the rate fixed by the Commission and the rate paid.

Applying this same order to the shippers of the Spokane district, and especially to the plaintiff in error in this case the defendant in error would be entitled to recover of plaintiff the difference between the old rate in effect October 31, 1907, and the rate fixed by the Commission, that is, the Commission raised the rate on shipments involved in this action 2 cents above what they were October 31, 1907. The points of shipment were east of Spokane and the shipments moved to points east of the "Pembina" line and between there and the "transfer points." The suit is for 5 cents above the October, 1907, rate.

Surely there are no facts in this case nor in theory to warrant a judgment against the plaintiff in error for the Pacific Coast rate for shipments which in fact did

not move over the distance between the Coast points and points of shipment by the plaintiff in error, a distance of some 400 miles. The Commission has no power or authority to arbitrarily order for the purpose of reparation that the plaintiff in error should be required to pay 3 cents more than the Commission fixed as a reasonable rate, from point of shipment to point of destination.

The only authority that the Commission had was to award damages in accordance with, not in conflict with, its findings of fact and conclusions in the Potlatch Company (Spokane) case, which case affected and fixed rates from the Spokane District.

The only authority the Commission had was under Section 16 to make an order of and for reparation in accordance with what the carrier was entitled to or the shipper should pay under the findings of fact of the Commission, and this should be measured by the rates from points of shipment to points of destination, not from Pacific Coast points to destination of the shipments involved in this action.

The plaintiff in error paid the old rate, that is, the rate in effect October 31, 1907, and was protected under the injunction from paying any other or different sum until the rates were fixed by the Interstate Commerce Commission, and this is not a suit by the plaintiff in error to recover back money paid, but is a suit by the defendant in error to require the plaintiff in error to pay 5 cents a hundred more than the rate in effect October 31, 1907, when the Commission in fact fixed the rate only 2 cents in excess of the rate in effect October 31, 1907.

The judgment of the lower Court should be reversed with costs and direction to enter a judgment for two-fifths of the amount sued for.

Respectfully submitted,

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